SUPREME COURT, U. S.

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No. 339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JEROME S. SPEVACK,
Petitioner,

vs.

LEWIS L. STRAUSS, ET AL.,
Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF ENGINEERS JOINT COUNCIL, INC.

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INTEREST OF AMICUS CURIAE

Engineers Joint Council, Inc. is a corporation not for profit organized under the laws of the State of New York. It was formed for the purpose of providing an agency to coordinate the activities of the major national professional engineering societies in matters of common interest to such societies.

Engineers Joint Council represents national engineering societies, regional engineering societies, and federations of engineering societies having a total membership of two hundred and fifty thousand engineers and scientists.

Since Engineers Joint Council represents such a vast number of our nation's engineers and the case at bar pre-

sents a serious threat to the fundamental rights of our country's engineers and scientists, consent was obtained to file this brief.

Engineers Joint Council filed briefs as amicus curiae in support of Petitioner's petition for writ of certiorari herein and Petitioner's prior petition for writ of certiorari (No. 641, October Term, 1957.) It otherwise has not participated in the proceedings below, nor has it knowledge of the record below because that record was impounded.

OPINIONS BELOW

The District Court rendered no opinion on entering its findings of fact and conclusions of law, and order denying petitioner's motion for a preliminary injunction.

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 248 F. 2d 752.

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated June 9, 1958, is reported at 257 F. 2d 208. An earlier opinion in this Court is found in 355 U.S. 601.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

The issues in this case which are of primary concern to Engineers Joint Council are:

1. Was the Atomic Energy Act of 1954 correctly interpreted by the Court of Appeals for the District of Columbia circuit as directing or authorizing the Respondents to

deprive a citizen of private property rights in an invention, which forms the subject matter of a pending U. S. patent application, which application and invention were disclosed to the U. S. Atomic Energy Commission in confidence according to the law, by publishing and/or publicly disseminating said subject matter without regard to the proprietary rights of the inventor thereof, without his consent, and to his detriment, where such act makes no provision for just compensation or due process of law for such deprivation.

2. Did the interpretation of the Court of Appeals render the statute unconstitutional as:

A. Providing for and authorizing the disposition of property not belonging to the United States and/or;

B. Authorizing a deprivation of private property without due process of law or providing for just compensation.

This amicus adopts the position of the petitioner with respect to these questions.

STATEMENT OF CASE

In the interest of brevity, this amicus curiae incorporates by reference herein the statement of the case as set forth in the petitioner's brief herein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are United States Constitution, Article I, Section 8; Article 4, Section 3; 5th, 9th and 10th Amendments; Atomic Energy Act of 1954, Sections 1, 2, 3, 141, 142, 146, 151, 152 and 153; The Patent Act of 1952, Sections 122 and 181, the applicable portions of which are set forth in the appendix hereto.

ARGUMENT

The decision of the Court below that the Atomic Energy Act of 1954 authorizes the Atomic Energy Commission to publish and otherwise publicly to disclose and disseminate the subject matter of a pending United States patent application when said application and invention were disclosed to the Atomic Energy Commission in confidence according to law, thereby destroying the proprietary rights of the inventor therein, is contrary to the language and meaning of that Act.

The Court of Appeals in reaching its decision read together Sections 36 and 141 of the Atomic Energy Act of 1954. These sections broadly authorize the dissemination of declassified information for the purpose of addding to scientific and industrial knowledge and aiding and encouraging scientific and industrial progress. The Court below interpreted this power as broad and inclusive and including the power to disseminate both information the property of the United States and information the property of private persons. Upon this interpretation the Court below dismissed the action as an unconsented suit against the United States upon the authority of *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 93 L. Ed. 1628.

The holding of the *Larson* case obviously applies to this matter. The *Larson* case held that a suit for injunction can be successfully maintained against officers of the United States only when their actions are either not authorized by statute, or if so authorized the statutory authority is unconstitutional. The Petitioner herein contends that the Atomic Energy Act of 1954 does not on the facts of this case authorize this disclosure and publication, or if it does so authorize it the statute as so construed and applied to

the facts of this case is unconstitutional. Therefore the questions as presented herein must need be decided before it can be determined whether this action is in fact an unconsented suit against the United States.

It is the view of this amicus that the Court below in interpreting the Atomic Energy Act of 1954 failed to give consideration to Sections 2 and 146 of the Act and the relevant provisions of The Patent Act of 1952. In Section 2 Congress made its findings as to the policies concerning use and development of Atomic Energy. The second of said findings is that "In permitting the *property* of the United States to be used by others, such use must be regulated in the national interest . . ." (42 U.S.C. Sec. 2012b).

Obviously secret confidential information that is classified as restricted data is either the property of the United States or some other party. The Commission is clearly given the authority to publish such data as it sees fit to declassify when such data is the *property* of the United States. However, when, as in this case, the data being the subject of a pending patent application is the property of a private person, logic, common sense and fair dealing require a strict interpretation of the statute.

Nothing in the history or terms of the statute reveal an intent by Congress to permit the Commission to destroy the property of private persons by publishing the subject matter of patent applications which have been kept secret by order of the Commission before a patent is issued by the United States Patent Office. On the contrary, Section 146 of the Act of 1954 provides that "Sections 141 to 145, inclusive, shall not exclude the applicable provisions of any other laws . . ." (42 U.S.C. Sec. 2166 (a). Sections 141 to 145 of the Act of 1954 are those dealing with the control of information. The Court below completely ignored this section and the applicable provisions of other laws; to-wit,

Sections 122 and 181 of the Patent Act of 1952 (35 U.S.C. 122 and 181).

Section 122 of the Patent Act provides that all patent applications will be kept in confidence and no information disclosed concerning them except as otherwise provided Section 182 provides for the machinery by which patent applications affecting the national defense may be disclosed to the Atomic Energy Commission and be placed under secrecy order. Upon rescission of this secrecy order on February 1, 1957 the provisions of Section 122 still controlled this pending patent application. Manifestly Congress did not intend to have the Patent Office preserving the application in confidence and the Atomic Energy Commission publishing the same to the world, yet that is the result reached by the Court below in refusing to give effect to Section 146 of the Atomic Energy Act of 1954.

Did the interpretation of the Court below put an unconstitutional construction upon the Atomic Energy Act of 1954 as:

I. Authorizing the disposition of property other than that of the United States.

It is a universal rule in statutory construction that if possible a statute should be construed and interpreted as accomplishing a constitutional purpose in a constitutional manner. This the Court below failed to do. Although it did not rule the Atomic Energy Act of 1954 to be unconstitutional as applied to the facts of this case, the interpretation put on the Act by the Court of Appeals must need result in holding that as interpreted it is unconstitutional. The Constitution clearly gives Congress the power to dispose of the property of the United States in Section 3 of Article 4. The reservations of powers provided for in the

Ninth and Tenth Amendments clearly bar from the power of Congress the right to dispose of the property of private persons. Further, the Fifth Amendment provides that no person may be deprived of property without due process of law.

Since the case of *James v. Campbell*, 104 U.S. 356, the subject matter of a patent has been recognized as property within the Fifth Amendment. It follows equally that the subject matter of a pending patent application is the property of the applicant. The Atomic Energy Act in Sections 151 et seq. provides for compensation to an inventor for the *use* of his invention or patent and in Section 173 compensation for disclosure of a patent as Restricted Data is allowed.

All of this may be constitutionally sustained upon the theory that by placing the patent application under a secrecy order and considering it as Restricted Data the Congress intended that the Commission would be taking an interest in said invention or patent on behalf of the United States. However, on the fact situation involved in the instant case no compensation is provided for in the Act and it is clear that Congress did not intend to purchase the inventor's rights to foreign patents only to have said rights destroyed by Commission publication. It is obvious, therefore, that what the Commission proposes to dispose of, i.e. the right to make foreign patent application, is not the property of the United States but that of Petitioner.

II. Taking of private property without due process of law.

The Court below refused to consider the argument that the action of the Commission constituted a taking of property without due process. In its opinion the Court of Appeals merely referred to the general jurisdictional stat-

ute granting jurisdiction to the Court of Claims, 28 U.S.C. Sec. 1491. It is obvious that if Petitioner were to seek relief in the Court of Claims he would have to do so on the Basis of a claim founded upon the Constitution since the Atomic Energy Act makes no provision for any such claim. However, this Court has in the past recognized that not every taking of private property by government authority gives rise to a claim for constitutional compensation, *Hooe v. United States*, 218 U.S. 322, *United States v. North American Trans. & Trucking Co.*, 253 U.S. 330. Moreover, the Constitution requires compensation only for property taken for a public use; no public use of Petitioner's property is being contemplated by the premature disclosure and publication thereof but merely the destruction of the same.

CONCLUSION

Wherefore, it is respectfully submitted that for the reasons given herein the decision of the Court of Appeals should be reversed and the case remanded to the District Court for hearing on the merits.

Respectfully submitted,

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APPENDIX

Constitutional Provisions, Statutes and Rules Involved

United States Constitution

Article 1, Section 8, reads in part as follows:

"The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" . . .

Article 4, Section 3, reads in part as follows:

"The Congress shall have Power to dispose of . . . Property belonging to the United States . . ."

Amendment V—Due Process Clause, reads in part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Atomic Energy Act of 1954.

August 30, 1954, c. 1073, Sec. 1; 68 Stat. 921 et seq.; 42 U. S. C. (Supp. IV) Sec. 2011 et seq:

"Sec. 2. (68 Stat. 921; 42 U. S. C. Sec. 2012) Findings. The Congress of the United States hereby makes the following findings concerning the development, use, and control of atomic energy:

"b. In permitting the property of the United States to be used by others, such use must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public."

" Sec. 3. (69 Stat. 922; 42 U. S. C. Sec. 2013) Purpose.—It is the purpose of this Act to effectuate the policies set forth above by providing for—

"a. a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

"b. a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

"f. a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."(

"*Chapter 12. Control of Information*

"Sec. 141 (68 Stat. 940; 42 U. S. C. Sec. 2161) Policy.—It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

"b. The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial

progress and public understanding and to enlarge the fund of technical information."

"Sec. 142. (68 Stat. 941; 42 U. S. C. 2162) Classification and Declassification of Restricted Data.—

"a. The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

"b. The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security."

Sec. 146. (68 Stat. 943; 42 U. S. C. Sec. 2166) General Provisions—

"a. Sections 141 to 145 inclusive, shall not exclude the applicable provisions of any other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of those sections.

"b. The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law."

Section 151 (a), (b); 42 U. S. C. (Supp. IV) § 2181)

"(a) No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon. Any patent granted for any such invention or discovery is revoked, and just compensation shall be made therefor.

(b) No patent hereafter granted shall confer any rights with respect to any invention or discovery to the extent that such invention or discovery is used in the utilization of special nuclear material or atomic energy in atomic weapons. Any rights conferred by any patent heretofore granted for any invention or discovery are revoked to the extent that such invention or discovery is so used, and just compensation shall be made therefor."

"*Sec. 152*

"Any invention or discovery, useful in the production or utilization of special nuclear material or atomic energy, made or conceived under any contract, subcontract, arrangement, or other relationship with the Commission, regardless of whether the contract or arrangement involved the expenditure of funds by the Commission, shall be deemed to have been made or conceived by the Commission, except that the Commission may waive its claim to any such invention or discovery if made or conceived by any person at or in connection with any laboratory under the jurisdiction of the Commission as provided in section 2053 of this title, or under such other circumstances as the Commission may deem appropriate . . .

"The Commissioner of Patents may proceed with the application and issue the patent to the applicant (if the invention or discovery is otherwise patentable) unless the Commission, within 90 days after receipt of copies of the application and statement, directs the Commissioner of Patents to issue the patent to the Commission (if the invention or discovery is otherwise patentable to be held by the Commission as the agent of and on behalf of the United States . . ."

Section 153 (a), (g); 42 U. S. C. (Supp. IV § 2183)

"(a) The Commission may, after giving the patent owner an opportunity for a hearing, declare any patent to be affected with the public interest if (1) the invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy; and (2) the licensing of such invention or discovery under this section is of primary importance to effectuate the policies and purposes of this chapter.

(g) The owner of the patent affected by a declaration or a finding made by the Commission pursuant to subsection (b) or (e) of this section shall be entitled to a reasonable royalty fee from the licensee for any use of an invention or discovery licensed by this section. Such royalty fee may be agreed upon by such owner and the patent licensee, or in the absence of such agreement shall be determined for each patent license by the Commission pursuant to section 2187 (c) of this title."

Patent Act of 1952

"*Sec. 122 Confidential Status of Patent Applications.*—Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner (of Patents)" (July 19, 1952, c. 950, sec. 1, 66 Stat. 801; 35 U. S. C. 122).

"*Sec. 181. Secrecy of Certain Inventions and Withholding of Patent.*—

. . . Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner (of Patents) be detrimental to the na-

tional security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission . . .

. . . If, in the opinion of the Atomic Energy Commission . . . the publication or disclosure of the invention by the granting of a patent therefor would be detrimental to the national security, the Atomic Energy Commission, . . . shall notify the Commissioner (of Patents) and the Commissioner (of Patents) shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof . . .

. . . The Commissioner (of Patents) may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to be issued that the publication or disclosure of the invention is no longer deemed detrimental to the national security." (July 19, 1952, c. 950, Sec. 1, 66 Stat. 805; 35 U. S. C. Sec. 181).